Dane County Dairy, Inc. *and* Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695. Case 30-CA-7218

16 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 June 1983 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dane County Dairy, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the findings and conclusions of the judge are the result of bias and prejudice. We reject that contention as unsupported.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Madison, Wisconsin, on January 20 and 21, 1983. The proceeding is based on a charge filed July 12, 1982, by Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695. The General Counsel's complaint alleges that Respondent Dane County Dairy, Inc., of Madison, Wisconsin, violated Section 8(a)(1) and (5) of the National Labor Relations Act by engaging in dilatory tactics to avoid signing an agreed-upon collective-bargaining agreement and by its repudiation of the terms and conditions of such agreement.

At the close of the General Counsel's direct presentation, Respondent elected to rely on the record, its answer to the complaint, and the affidavit (G.C. Exh. 7) of Respondent's president, Duane F. Bowman. The General Counsel thereupon moved for summary judgment. The court then requested the General Counsel to submit his motion in written form and February 7, 1983, was established as the date for receipt of Respondent's reply. A brief date also was set. The General Counsel elected not to pursue its request for summary judgment and both parties filed timely briefs.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent engages in the wholesaling of dairy and related products. During the representative year it purchased and received at its Madison, Wisconsin facility products, goods, and materials valued in excess of $50,000 from companies that had received them from points outside Wisconsin. It admits that at all times material herein it is and has been engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent regularly employs approximately seven wholesale route drivers. Several drivers had originally worked many years for a predecessor company, Bancroft Dairy, until approximately 1971, when the wholesale routes were spun off as Dane County Dairy. The drivers continued in the same job with no break in service, serving basically the same routes and customers they served before. In 1977, Duane Bowman purchased all of Respondent's outstanding stock from then owner Jerome Hoffman. The Union (or its predecessor) has represented the wholesale drivers of Respondent since at least 1952. In 1974, Louis Firari, the recording secretary and business agent of the Union, became the person responsible for negotiating contracts on behalf of the members with Respondent as well as other Madison area dairies. Prior to 1980, Firari negotiated contracts with then owner Hoffman, which contracts had effective time periods of 3 years. In May 1980, Firari negotiated the Union's first contract with Bowman, with an effective date of the agreement for 1 year from June 1, 1980, to May 31, 1981. Agreement was reached after only one bargaining session meeting and a phone call. Firari's contemporaneous notes show that they resolved the issues of pensions, health and welfare benefits, wages and holidays. Respondent observed the terms of the agreement but did not sign the contract until April 29, 1981, 11 months after the agreement was reached and 1 month before it was scheduled to expire.

Shortly prior to signing the contract Bowman sent a letter dated March 30, 1981, to Firari which referred to "our existing contract," notwithstanding that it was unsigned at that time. Bowman stated in that letter that he was exercising his option to terminate the old contract pursuant to article XXIV of the collective-bargaining agreement, designated Mary Ann Bowman, his wife, as the contact person for labor matters, and closed with a comment that Respondent wished to be on record as: "condoning" the United Mine Workers and their position of "no contract, no work." Also on April 29, 1981, Respondent mailed the Union an unsigned copy of the 1980–1981 agreement scheduled to expire on May 31, 1981, on various pages of which were successor contract proposals written in by Duane Bowman.

On May 5, 1981, Bowman wrote a message on the Union's posted notice of its next union meeting stating: "Please appoint a different negotiator. Dane County Dairy, Inc. has lost confidence in Louis Firari due to his lie to me." Bowman testified that his feelings were based on an incident April 30, 1981, when someone from the Union failed to show up at an unemployment compensation hearing to assist Bowman as was agreed to by Firari. Bowman retained his irritation even though he won the case and the Union sent a letter of explanation and apology dated May 4, 1981. As a result of his personal irritation with Firari as well as his irritation with other "teamsters," based on his reading of articles he kept in a file, Bowman named his wife to act at his direction as labor negotiator. Mrs. Bowman, however, had no experience or knowledge of labor negotiations and at that time she was a full-time employee of another business.

Thereafter, by letter dated May 11, 1981, Firari advised Mrs. Bowman of the available bargaining dates for himself or Mike Spencer, a business agent for the Union. Bowman testified he saw the original signed letter that was sent to Respondent on May 11. By letter dated May 13, 1981, Mrs. Bowman responded to Firari's letter stating that before there could be meetings, she wanted the Union's "demands." By letter dated May 18, 1981, and an attachment, Firari forwarded the Union's proposals. Bowman testified Respondent received the Union's "demands" and responded with a hand-delivered letter, dated May 28, 1981, by Mrs. Bowman reaffirming its "offer" of April 29, 1981. Mrs. Bowman spoke with Firari on the same day. She then sent a letter and a signed copy of its proposal with a request that Firari present it to his members, advise Respondent in writing of the results of the vote, and send back a signed copy. By letter of May 29, 1981, Firari informed Respondent that the proposal was unacceptable and suggested three dates when Spencer was available for "face to face" negotiation.

Mrs. Bowman responded with a phone call and a meeting was arranged and held between Spencer and both Bowmans at the union hall on June 2, 1981. Union business agent James Newell also was present as an observer. He testified that he did not participate in the discussions, that Mrs. Bowman did not say much and that once when she started to speak up she was cut off by Bowman. Otherwise, the meeting appeared to be cordial and lasted between 1 and 2 hours. Spencer made contemporaneous notes of the meeting. Bowman did not but he received a copy of the notes from Spencer and acknowledged that they were accurate. Bowman learned that in the past Spencer's grandmother had taken care of his grandfather, he trusted Spencer at that time, he felt the meeting was amicable, and he had no feeling that Spencer was not trying to reach an agreement.

On June 1, 1981, however, the Union filed a charge with the Board (Case 30–CA–6526), alleging that Respondent was bargaining in bad faith by: refusing to meet at reasonable times; attempting to force the Union to conduct negotiations by the mail; by attempting to dissuade bargaining unit employees from supporting the Union; and, by defacing union notices. On June 3, 1981, Bowman, rather than Mrs. Bowman, responded to the charges by denying the allegations, challenging the Union to prove the charges, and objecting to any withdrawal or voluntary adjusting of the matter without an impartial investigation.

The second of three meetings was held at Bowman's house on June 4, 1981. Bowman acknowledged a meeting at his house but not the date. He acknowledged discussion of the items listed in Spencer's notes and he repetitively implied his recall of a total of only two meetings. Bowman's testimony in this respect was confused and evasive whereas Spencer's was direct and forthright and was supported by his appointment book and contemporaneous notes. Accordingly, I find Spencer's testimony of the three meetings and their contents to be reliable and credible.

Although Mrs. Bowman greeted Spencer when he arrived, the negotiations otherwise took place solely between Spencer and Bowman. Agreement was reached on wages (72 cents an hour), health and welfare, pension, some "language" items, a discretionary lunch break period, and deletion of the 20-cent-per-hour extra pay to employees running vacation routes. Spencer then told Bowman that if an agreement were reached he would withdraw the charges in Case 30–CA–6526. In response, Bowman vehemently objected, stating he wanted his day in court with Firari. Otherwise, Spencer believed at the end of the meeting on June 4 that everything had been "pretty well wrapped up" leaving only a question of a wage break on new hires and the length of the contract. Spencer then suggested a 2-year contract and Bowman said he would look at it. Spencer said he would put together both a 1- and 2-year contract to go over at the next meeting, which was scheduled for June 9, 1981, at the union office.

Bowman and Spencer met alone on June 9 (although Bowman suggested that Mrs. Bowman was at all the meetings, his testimony was somewhat confusing on this point and, as otherwise noted, she played no role in the earlier negotiations, she was not called as a witness, and Spencer's recollection of the events is otherwise found to be clear and credible). Spencer gave Bowman a handwritten outline of the proposed contract, they went over it, and Bowman made marks, checks, or "ok" by the various items. Two items were deleted, and Bowman placed a "question mark" after the item of terms for a second

year to the contract and he added a 12th item regarding a reduction in termination pay.

Spencer testified that Bowman said he wanted to think about it and do a little checking and he would get back on it in a day or two, whether or not he wanted the 1- or 2-year agreement. On June 11, 1981, Bowman called Spencer and said they had a deal regarding the 2-year contract. Spencer immediately sent a letter, dated June 11, 1981, to the National Labor Relations Board advising it that the Union had "reached a tentative labor agreement" with Respondent and requested that the charges filed in Case 30–CA–6526 be withdrawn. He also told Firari that he had a 2-year tentative agreement with Bowman and that it should be taken to the membership for ratification. Firari wrote down the terms described by Spencer and presented them to the membership on June 18, 1981. Firari's notes show that he informed the six employees present of the increases they would be receiving during the period June 1, 1981, to May 31, 1983. Two employees who attended the meeting also testified that Firari told them of the terms of a 2-year agreement and the employees voted unanimously to ratify the contract.

Firari gave Spencer's notes to his secretary so the changes could be typed into the old contract which was already on a computer. Firari then informed Respondent by certified mail dated June 19, 1981, that the 2-year agreement negotiated by Spencer had been ratified by the Dane County Dairy employees and that once the contract were typed it would be sent for signature. The receipt of this letter was acknowledged by Bowman. By letter dated June 23, 1981, Spencer sent six copies of the 2-year agreement to Bowman for his signature. Bowman testified evasively about receiving the contracts but admitted they probably came into his office and that he saw a copy.

Subsequently, when Spencer prepared to close out his file on the matter, he noticed that Bowman had not yet returned the signed contract and he sent Bowman a followup letter on July 9, 1981. Bowman admitted receiving the letter informing him he had not returned the signed contract around that same date. Bowman did not respond to the letter and Spencer phoned Bowman sometime in August or September 1981 and again inquired about the signed contract. Bowman, who recalled Spencer's phone call, responded that they were at the attorney's for proofing and that he would get a hold of the attorneys and try to hurry them up a little bit and get one to them as soon as he got them back. At no time did Bowman tell Spencer that he felt there was no agreement, that Bowman simply wanted a 1-year collective-bargaining agreement, or that Bowman never received the contracts. Sometime thereafter Spencer called Respondent and left a message noting that he had not received the signed contract; however, no reply was made by Respondent. In the meanwhile, however, Bowman put into effect the provisions for the period starting in June 1981 for the first year of the contract.

Firari was aware of Spencer's followup letter and Bowman's implementation of the contract terms for the June 1981–1982 period but he was unaware that the agreement was not signed by Bowman until shortly after June 1, 1982, when one of Respondent's employees called to inform him that some provisions of the contract were not being followed and that Bowman's secretary said this was because they did not have a contract (or a copy of a contract). Firari called the secretary and told her he would send her four copies, with two to be signed and returned. Firari also contacted the union president, John Konebel, who then called Bowman and informed him that it had been brought to his attention that the Union had not received a signed contract and asked whether there was a problem and if he wanted to meet and discuss it. Bowman replied that "the contract had to go to the Board of Directors" and then Bowman said he would get back to him in "my good time." Again, Bowman said nothing about there being no contract or that negotiations had never been completed.

By cover letter dated June 14, 1982, Firari sent four copies of the 1981–1983 contract to Bowman for his signature. Bowman admitted that after he received the letter and contracts he returned the letter with a handwritten note dated June 15, 1982, which said Respondent's board of directors had failed to ratify the agreement and stating that there was now a "Patco situation." At the hearing Bowman explained what he meant by "Patco" situation by saying:

> . . . it was my understanding that a negotiation process between labor and, management, with the Professional Air Traffic Controllers (PATCO) where a contract was negotiated and agreed upon between the negotiating people, and then was—was subsequently rejected by the members of the bargaining group.

IV. DISCUSSION

At the close of the General Counsel's direct evidence Respondent's owner, Duane Bowman, acting for Respondent essentially on his own behalf (with the occasional assistance of an attorney-acquaintance), chose to rest and to rely on the existing record, his answer and affidavit, and his contentions on brief. On brief, Respondent argues that the Union "overlooked" aspects (apparently referring to the change in termination pay) of the "alleged" contract that were detrimental to the union members; that it did not bring such significant matters (not specifically identified on brief) to the attention of the members at the time of their ratification vote; and that the Union failed to rectify its errors by asking for further bargaining sessions. From this, Respondent concludes that a meeting of the minds failed to exist between the Union and its members as well as between the Union and Respondent. It also argues that a failure to reach agreement on one issue constitutes sufficient grounds for an employer to refuse to execute an agreement, citing *Mercedes-Benz*, 258 NLRB 803 (1981). Respondent then suggests that its refusal to sign may be construed as a means of Respondent protecting its employees from the negligence of their own Union.

On brief Respondent does not renew the denial in its answer to the complaint that the change was timely filed. In any event, I agree with the General Counsel that the

repudiation of the contract and the Union's knowledge thereof occurred in June 1982, when Bowman refused to institute the second-year terms of the 2-year agreement negotiated on June 11, 1981. Therefore, this is the date the Union knew or should have known that a violation occurred and that is when the 10(b) period began to run. Moreover, Respondent had shown by its practice with the immediate preceding agreement (which it did not sign until 11 months had elapsed) that it might be expected to follow the same course and therefore the Union had no earlier reason to believe that Respondent in fact had violated the Act.

On brief the General Counsel contends that the parties reached agreement on June 9, 1981, on all significant matters for at least a 1-year contract; that a 2-year contract was orally agreed to on June 11, 1981; that Respondent abided by the first-year contract terms; and that the agreement is valid and enforceable despite Respondent's mid-term attempt to repudiate the contract and its failure to sign the written contract.

A review of the record shows that the Union and Respondent have enjoyed a long history of amicable collective bargaining reaching back to the 1950's under previous ownerships. Through purchase of Respondent's stock, Duane Bowman became its owner in 1977. At the time of the 1980 negotiatons, he continued this practice with one change, that being a change from the previous 3 year contract to one running for only 1 year, from June 1, 1980, to May 31, 1981. This latter agreement was reached after only one bargaining session and a followup phone call. Bowman promptly abided by its terms; however, he did not sign the contract until April 29, 1981.

During May 1981, arrangements for bargaining on a successor contract were discussed; however, Bowman at this time had developed a personal animosity towards union business agent Firari and he attempted to avoid dealing with Firari by naming his wife as labor negotiator. It otherwise is clear that she was at most a figurehead and that Bowman himself controlled all activities of Respondent (subsequently, Bowman also attempted to shift responsibility for Respondent's execution of the agreement to the "Board of Directors;" however, no evidence was presented to show any actions by any independent board and it is clear that the board could be nothing other than Bowman's alter ego and that his attempts in this respect were, in effect, a sham to avoid or delay execution of the subsequent agreement). The Union accommodated Bowman by substituting another business representative, Spencer, as its negotiator. When an exchange of letters failed to result in a meeting date prior to the expiration of the then current contract on May 29, 1981, the Union filed a charge in order to bring the parties to the table. Arrangements for a meeting were made about the same time and the first negotiating session was held on June 2, 1981. This meeting and subsequent sessions on June 4 and 9, 1981, were amicable and resulted on June 9 with the resolution of all matters (included a request from Bowman that termination pay apply only to years with Dane County Diary), except the length of the agreement. On June 11, 1981, Bowman called Spencer and agreed to a 2-year term. Shortly thereafter a ratification meeting was held by the employees (the termination pay matter was not discussed), the agreement was approved, and it was typed up, signed by the Union, and sent to Respondent.

Respondent did not execute the agreement; however, it implemented the terms agreed to for the first year of the understanding. Respondent then displayed an apparent reluctance to signing the agreement by evasively telling the Union that the contract was at his attorney's for proofing and that the contract had to go to Respondent's board of directors. At no time did Respondent indicate that there was a mistake in the agreement it had been sent to sign nor did it otherwise indicate that there was any problem with the terms of the agreement. However, during this latter period of time Bowman became aware of the situation where the Professional Air Traffic Controllers (Patco) membership had rejected a negotiated contract. When the time for implementation of the terms for the second year of Respondent's agreement approached, Bowman told the Union they had a "Patco situation" and I infer by Bowman's action that he believed he had an opportunity to repudiate the contract and avoid meeting his obligation under the provisions for the second year.

In light of all the circumstances reviewed above, I find that, except for the length of contract, the parties had reached full agreement by their third meeting on June 9, 1981, and I further find that by phone call of June 11, 1981, Respondent agreed to the 2-year term and that this action is consistent with the previous year's negotiations when agreement was reached with one meeting and one followup phone call. Contrary to Respondent's contention, I find no failure to reach agreement on the change in termination pay or on any other issue. In any event, Respondent is in no position to assert a right on behalf of union member employees, especially when Respondent was the one who initiated the change which it now purports the Union negligently agreed to. Otherwise, the record fails to indicate that any further negotiations on issues were contemplated by either party. Moreover, Respondent's implementation of the terms for the first year, its failure to notify the Union of any problem with the terms of the written document when it was sent for signature, the amiable nature of the negotiations, and Respondent's subsequent acknowledgements that the contract was being proofread by its attorney or reviewed by its purported board of directors, all are acts which are inconsistent with its present contention that a binding agreement was not reached.

Under the provision of Section 8 of the Act there exists a mutual obligation for an employer and the representative of the employees to execute a written contract incorporating any agreement reached, if requested by either party. Here, Respondent has refused and failed to execute the collective-bargaining agreement reached by the parties on or about June 11, 1981, and, accordingly, I must find that Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged. See *Torrington Construction Co.*, 235 NLRB 1540 (1978), *Cutter Laboratories*, 265 NLRB 577 (1982), and *Granite State Distributors*, 266 NLRB 457 (1983).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to execute the collective-bargaining agreement between the Union and Respondent, as reached and agreed on by the parties on or about June 11, 1981, Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, Respondent shall be ordered to cease and desist therefrom and otherwise to take appropriate remedial action to effectuate the policies of the Act. Respondent will be directed to execute the collective-bargaining agreement, on the Union's request, and to bargain with the Union as the exclusive representative of the employees. Inasmuch as the complaint alleges that employees have suffered financial losses regarding increases in wages and pension and health and welfare benefits as a result of Respondent's failure to follow provisions for the second year of the agreement and its unlawful refusal to sign the collective-bargaining agreement reached June 11, 1981, in order to assure that the policies of the Act are effectuated, Respondent should be required to give retroactive effect to the contract to the extent it has failed to do so, and to make whole employees who may have sustained monetary losses, with such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Dane County Dairy, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union by failing and refusing to sign the collective-bargaining agreement reached by the parties about June 11, 1981.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action.

(a) On request of the Union, promptly execute and give retroactive effect to the collective-bargaining agreement reached by the parties about June 11, 1981.

(b) Make whole all employees covered by the contract by promptly making such payments, adjustments, and perquisites as required under the foregoing collective-bargaining agreement with interest, in the manner set forth in the section above entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records and reports, and all other records necessary to analyze the amount of payment, if any, due under this Order.

(d) Post at its Madison, Wisconsin place of business copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 30, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695, by failing and refusing, on request, to sign a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, on request of the Union, execute, and give retroactive effect to the collective-bargaining agreement reached about June 11, 1981, and WE WILL compensate any employees covered by the contract for any monetary losses they may have sustained as a result of our refusal to sign the contract.

DANE COUNTY DAIRY, INC.